STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 15, 2007
v	No. 265134 Wayne Circuit Court
GRANT NOUBISHI IGWE, Defendant-Appellant.	LC No. 03-004318-01

Before: Markey, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of four counts of unauthorized practice of medicine, MCL 333.16294, for which he was sentenced to four years' probation. We affirm.

I. Facts

Defendant was charged with conspiracy to engage in the unauthorized practice of medicine and with engaging in the unauthorized practice of medicine on August 14, 2000, and March 14, March 21, and August 20, 2001. The conspiracy charge was dismissed on the prosecutor's motion after the jury found defendant guilty of the four charges of unauthorized practice of medicine.

The convictions arise from an undercover investigation of the Preferred Family Medical Clinic in Detroit conducted by the Michigan State Police. At the time of the investigation, defendant worked at the clinic with Dr. Renaldo Arceno, a licensed medical doctor who testified pursuant to a plea agreement. According to Dr. Arceno, defendant hired him in December 1999 to see patients and supervise unlicensed medical personnel. Dr. Arceno denied having any personal knowledge of defendant's medical background. Defendant told Dr. Arceno that he finished medical school, but was not licensed and could not sign prescriptions. Other evidence indicated that defendant attended a medical program at the University of CIFAS in the Dominican Republic in 1983 and 1984, but that the university closed in 1984, without defendant having obtained any academic degree.

On August 14, 2000, Troopers Kelly Hampton and William Eberhardt posed as patients at the clinic. Defendant took their blood pressure and asked them why they were at the clinic. Trooper Hampton told defendant that she needed Tylenol 3 for an injured finger. Trooper

Eberhardt asked defendant for the same medication for lower back pain. Defendant examined both troopers. Thereafter, prescriptions for Tylenol 3 were called into the pharmacy by the clinic. Receipts for the prescriptions indicated that Dr. Arceno was the prescribing doctor. When Trooper Hampton returned to the clinic on August 28, 2000, she was seen by defendant and Dr. Arceno. Unlike the earlier visit, Trooper Hampton was given a written prescription at the clinic for Tylenol 3.

State police troopers made additional undercover visits to the clinic. On March 14, 2001, defendant diagnosed Trooper Dennis Diggs with bronchitis after conducting an examination. Defendant showed some sample medication to Trooper Diggs and instructed him on how to take the medication. A receptionist gave Trooper Diggs the sample medication and a written prescription for phenergan expectorant, which indicated that it was signed by Dr. Arceno. On March 21, 2001, Trooper Diggs complained to defendant that he had pressure in his ears. Defendant examined his ears and used a cotton swab to take a culture from his mouth. Trooper Diggs refused defendant's suggestion that he get an injection, but picked up two prescriptions called into a pharmacy from the clinic. On August 20, 2001, Trooper Diggs returned to the clinic with complaints of facial pressure. After conducting an examination, defendant diagnosed Trooper Diggs with sinusitis. A receptionist gave two prescriptions to Trooper Diggs, which indicated that they were signed by Dr. Arceno.

II. Analysis

On appeal, defendant challenges the trial court's denial of his motion for a directed verdict. When reviewing a trial court's denial of a directed verdict motion, we review the evidence in a light most favorable to the prosecution to determinate whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). The prosecutor need not negate every reasonable theory consistent with the defendant's innocence. *People v Hardiman*, 466 Mich 417, 423-424; 646 NW2d 158 (2002).

Defendant was convicted of violating MCL 333.16294, which provides that "[e]xcept as provided in section 16215, an individual who practices or holds himself or herself out as practicing a health profession regulated by this article without a license . . . is guilty of a felony." "Health profession" is defined in MCL 333.16105(2) as "a vocation, calling, occupation, or employment performed by an individual acting pursuant to a license or registration issued under this article." The "practice of medicine" means

> the diagnosis, treatment, prevention, cure, or relieving of a human disease, ailment, defect, complaint, or other physical or mental condition, by attendance, advice, device, diagnostic test, or other means, or offering, undertaking, attempting to do, or holding oneself out as able to do, any of these acts. [MCL 333.17001(1)(d).]

It was undisputed at trial that defendant did not possess a license to practice medicine. Further, viewed in a light most favorable to the prosecution, the testimony of the state troopers who posed as patients at the clinic was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant performed acts falling within the practice of medicine during each visit, by diagnosing the troopers' conditions and determining a treatment plan. Although

defendant argues that he only performed tasks under the supervision and direction of Dr. Arceno, the troopers each testified that they did not see Dr. Arceno on August 14, 2000. Trooper Diggs testified that he did not see Dr. Arceno on March 14, March 21, or August 20, 2001. According to the witnesses, the only involvement of Dr. Arceno was that the documents they obtained for their prescriptions showed that Dr. Arceno approved the prescriptions. And while Dr. Arceno testified that he always directed medical care and made all final treatment decisions with regard to prescriptions, he also admitted that he pleaded guilty to healthcare fraud and was testifying at trial pursuant to a plea agreement. The credibility and weight of the witnesses' testimony was for the jury to decide. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

Defendant relies on the statutory exception referenced in MCL 333.16294, "except as provided in section 16215," to argue that the evidence was insufficient to sustain each conviction. We will assume without deciding that negating the statutory exception is an element of the offense for which defendant has no burden of producing evidence, inasmuch as the parties' do not brief this issue and the jury instructions treated the statutory exception as an element of the charges.[1] The statutory exception provides, in pertinent part:

> [A] licensee who holds a license other than a health profession subfield license may delegate to a licensed or unlicensed individual who is otherwise qualified by education, training, or experience the performance of selected acts, tasks, or functions where the acts, tasks, or functions fall within the scope of practice of the licensee's profession and will be performed under the licensee's supervision. *A licensee shall not delegate an act, task, or function under this section if the act, task, or function, under standards of acceptable and prevailing practice, requires the level of education, skill, and judgment required of the licensee under this article*. [MCL 333.16215(1) (emphasis added).][2]

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[1] We note in passing that, while criminal statutes have generally been construed to require the prosecution to prove that a defendant is not within an exception incorporated in the enacting clause of a statute, *People v Rios*, 386 Mich 172; 191 NW2d 297 (1971), the Legislature may impose a burden of producing evidence on the defendant, see *People v Perkins*, 473 Mich 626, 637-640; 703 NW2d 448 (2005).

[2] The supervision required under the statute does not require that a licensed physician directly supervise a qualified person. *People v Callon*, 256 Mich App 312, 324; 662 NW2d 501 (2003). The term "supervision" means:

> [E]xcept as otherwise provided in this article, . . . the overseeing of or participation in the work of another individual by a health professional licensed under this article in circumstances where at least all of the following conditions exist:
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> (a) The continuous availability of direct communication in person or by radio, telephone, or telecommunication between the supervised individual and a licensed health professional.

(continued…)

We note that defendant's challenge to the sufficiency of the evidence excludes consideration of the specific standard for nondelegable acts, tasks, and functions in MCL 333.16215(1). But in any event, according to the testimony of the prosecution's expert, Dr. John Frownfelter, the practice of medicine begins with seeing a patient to take a history and physical. A diagnosis is then made and treatment is provided for the patient. Although there are circumstances in which an individual could practice medicine under the supervision of a licensed physician, this does not include an individual without a medical degree. Dr. Frownfelter further testified that the task of diagnosis cannot be delegated to a nonlicensed practitioner.

Viewed in a light most favorable to the prosecution, the evidence permitted the jury to find that defendant performed diagnostic tasks during each of the four visits underlying the convictions. Therefore, we agree that the evidence was sufficient to establish that the statutory exception does not apply. Defendant's contrary argument, based on *People v Hoxzey*, 260 Mich 648; 245 NW 543 (1932), and *People v Albert*, 358 Mich 647; 101 NW2d 378 (1960), is misplaced. Those cases involved charges of unlawfully practicing medicine under a predecessor statute to MCL 333.16924. In *Hoxzey*, there was evidence that the defendant was present and provided assistance to a licensed physician, who examined, diagnosed, and prescribed medication for the patient. In *Albert*, the defendant was charged with assisting a licensed physician in performing surgery by holding retractors, removing clamps off bleeders, cutting sutures, and handing instruments to the physician. In contrast, the evidence in this case indicated that a licensed physician did not have any contact with the undercover troopers during each of the four office visits in which defendant performed nondelegable diagnostic tasks.

Because the evidence that defendant performed nondelegable acts during the office visits was sufficient for the prosecutor to negate the statutory exception for each conviction, it is unnecessary to address whether defendant performed any specific acts during the visits that would fit within the statutory exception for an unlicensed individual who is otherwise qualified by education, training, or experience to perform selected acts.

Defendant's additional argument within this issue, that the prosecutor engaged in misconduct by presenting Dr. Frownfelter's allegedly false testimony and arguing that evidence to the jury, is not properly presented to this Court because it is not set forth in the statement of questions presented, as required by MCR 7.212(C)(5). *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). Therefore, we decline to address this issue.

Defendant next argues that the trial court erred in denying his motion for a new trial on the ground that the verdict was against the great weight of the evidence. This issue is not

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> (b) The availability of a licensed health professional on a regularly scheduled basis to review the practice of the supervised individual, to provide consultation to the supervised individual, to review records, and to further educate the supervised individual in the performance of the individual's functions.
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> (c) The provision by the licensed supervising health professional of predetermined procedures and drug protocol. [MCL 333.16109(2).]

properly before us because defendant has failed to provide this Court with a copy of the transcript of the hearing on his motion, as required by MCR 7.210(B), despite a request from this Court. *People v Kelly*, 122 Mich App 427, 429-430; 333 NW2d 68 (1983). But even if we were to consider defendant's claim under the plain error doctrine in *Carines, supra,* we would not reverse. It is not apparent that the evidence preponderates so heavily against the verdict that it would constitute a miscarriage of justice to allow the verdict to stand. *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003).

Next, defendant argues that the trial court erred by allowing the prosecutor to introduce exhibit evidence of his academic record from the defunct medical school, the University of CIFAS, in the Dominican Republic. Defendant argues that the evidence was inadmissible under MRE 902(3). In a related issue, defendant argues that his right to appeal has been impeded because the lower court record provided to this Court does not contain the prosecutor's trial exhibits from the Dominican Republic.

Although MCR 7.210(C) states that a party possessing any exhibits offered into evidence must file them with the trial court within 21 days after the claim of appeal is filed, xerographic copies of the exhibits may be filed unless the trial court orders otherwise. But "not every gap in a record on appeal requires reversal of a conviction." *People v Wilson (On Rehearing)*, 96 Mich App 792, 797; 293 NW2d 710 (1980). If the defendant is not at fault for the missing exhibit, the material question is whether the available record is adequate to allow for meaningful appellate review. See *People v Adkins*, 436 Mich 878; 461 NW2d 366 (1990). A defendant must establish that he was prejudiced by the missing exhibit. See *People v Drake*, 64 Mich App 671, 679; 236 NW2d 537 (1975). The adequacy of the record in a particular case depends on the questions that must be asked. *Wilson, supra* at 797.

In this case, it is not clear why the exhibits were not made part of the record. But defense counsel stated at trial that he had photocopies of the exhibits. Further, the content of the exhibits was revealed at trial when defendant challenged their admissibility, and a prosecution witness, Eric Nissani, translated the Spanish language in the exhibits as part of the prosecutor's offer of proof and again before the jury after the trial court admitted the exhibits. Defendant again challenged the admissibility of the exhibits when moving for a new trial and a review of defendant's supplemental brief in support of that motion prepared by defendant's present appellate counsel provides no indication that appellate counsel was impeded in his ability to argue that the challenged exhibits were not properly authenticated.

Defendant's failure to provide this Court with the transcript of the hearing on his motion for a new trial could preclude our consideration of both defendant's challenge to the adequacy of the record on appeal and his challenge to the admissibility of the exhibits. MCR 7.210(B); *Kelly, supra* at 429-430. Without the transcript, we are unable to ascertain if arguments were made, or if the trial court made findings that would be helpful in resolving defendant's claim on appeal. But even if we were to overlook defendant's failure to provide this Court with the transcript, we find no basis for reversal.

We are satisfied that the trial record adequately discloses the substance of the exhibits, as translated by the Spanish interpreter, to allow for meaningful appellate review of the trial court's decision to admit the exhibits. Defendant challenged the exhibits on the basis that they were not original documents, were not properly authenticated, and were incomplete or inaccurate.

A trial court's decision to admit evidence is generally reviewed for an abuse of discretion, but preliminary questions of law affecting the admissibility of evidence are reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). A defendant must timely and specifically object to preserve an evidentiary issue for appeal. MRE 103(a)(1). An unpreserved claim of evidentiary error is reviewed under the plain error doctrine in *Carines, supra*. See MRE 103(d); *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003).

The record reflects that the prosecutor introduced defendant's academic records, consisting of four exhibits. According to the Spanish interpreter's testimony, the exhibits were faxed copies of documents provided by the Dominican Republic Secretary of State of Higher Education of Science and Technology, Secretary of State of Legalization and Certification or the Secretary's underwriter, which indicated that the documents were provided in response to a request made by Trooper Eberhardt to verify defendant's medical studies at the University of CIFAS. Exhibit 68 contained an acknowledgement of Trooper Eberhardt's request and general information concerning defendant's enrollment in 1983 and 1984, which included a statement that defendant passed 52 credits before the university closed in 1984. Exhibit 66 contained a detailed certification of the classes defendant completed, which indicated that defendant took 99 and passed 58 credits. Exhibit 67 contained information about the university's system for evaluating a student's performance, and Exhibit 69 contained a certification that the information provided was based on archived documents from the closed university.

Although the prosecutor did not produce an original copy of the documents at trial, we conclude that defendant has abandoned any challenge to the trial court's decision to allow the faxed copies of the documents to be admitted by failing to adequately brief this issue. Whether a duplicate is admissible presents a question distinct from whether a document was properly authenticated. See MRE 901; MRE 1003. The failure to brief the merits of an allegation of error constitutes an abandonment of the issue. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

We therefore limit our review to defendant's claim that the requirements for authenticating a foreign public document were not satisfied.

MRE 902 provides, in pertinent part:

> Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:
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> * * *
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> (3) A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, *and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation*. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the

> United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification. [Emphasis added.]

Although we have found no Michigan cases interpreting this rule, we may look to federal cases interpreting the identical federal counterpart in FRE 902(3). See generally *People v Katt*, 468 Mich 272, 280; 662 NW2d 12 (2003); *People v Malone*, 445 Mich 369, 380 n 10; 518 NW2d 418 (1994). Under *Raphaely Int'l, Inc v Waterman Steamship Corp*, 972 F2d 498, 502 (CA 2, 1992), the first inquiry under FRE 902(3) is to ascertain if a properly executed or attested foreign public document is accompanied by a final certification of genuineness from an authorized governmental official. If the foreign public document is not certified, two conditions must be satisfied to presume its authenticity: (1) a reasonable opportunity to investigate the authenticity and accuracy of the document, and (2) good cause. Under *United States v De Jongh*, 937 F2d 1, 5 (CA 1, 1991), the burden of showing good cause rests on the proponent of the document, but "[w]here the adversary, despite a fair chance to examine into the document's bona fides, casts no serious doubt on its authenticity, a finding of good cause can much more readily eventuate."

We agree with defendant that the record does not reflect the final certification of the signature and official position contemplated by MRE 902(3). Therefore, the exhibits could not properly be admitted by the trial court unless they could be presumptively authenticated without a final certification. The record demonstrates that defendant did not specifically object at trial on the ground that the exhibits could not be presumptively authenticated without a final certification. And while the trial court did not state that it was admitting the exhibits under the exception for presumptive authenticity, the prosecutor represented that defense counsel was provided with copies of the exhibits on January 16, 2004, and defense counsel stated that he received photocopies of the academic records "a few months before the trial" and "I can read Spanish. I know what it purports to say."

Although defendant asserts on appeal that defense counsel did not see the exhibits before trial, he has not provided any record support for this assertion. We will not search the record for a factual basis to sustain defendant's position. *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990). We are not persuaded that the content of the exhibits, with regard to defendant's credits, or the use of a word in Exhibit 69 that, according to the Spanish interpreter meant "canceled," precluded their admissibility. Because defendant did not make a specific objection directed at the presumption for authenticity, and we find no plain error that would preclude the admission of the exhibits under the presumption, we conclude that defendant has not established any basis for reversal. MRE 103(d).

Affirmed.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Kirsten Frank Kelly